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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

EDNA SANTOS, Plaintiff and Appellant, v. SCOTT VILLA APARTMENTS, L.P., et al., Defendants and Respondents.	B207774 (Los Angeles County Super. Ct. No. BC355923)

APPEAL from the judgment and orders of the Superior Court of Los Angeles County. Paul Gutman, Judge. Affirmed.

Grassini & Wrinkle and Ronald Wrinkle for Plaintiff, Appellant, and Cross-Respondent.

Haight Brown & Bonesteel, Thomas N. Charchut; LaFollette, Johnson, De Haas, Fesler & Ames, Alfred W. Gerish, Jr., Troy C. Lee; Allie & Schuster and William D. Schuster for Defendants, Respondents, and Cross-Appellants.

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Edna Santos filed a wrongful death action against Scott Villa Apartments, L.P. (Scott Villa) and Francis Property Management, Inc. (collectively "respondents"), after the murder of her daughter, Sharon Santos.[1] Appellant alleged respondents' maintenance worker killed Santos and respondents' negligence as his employer made them liable for Santos's death. A jury returned a verdict for appellant. The trial court denied respondents' motion for a judgment notwithstanding the verdict (JNOV), but granted their motion for a new trial. Appellant challenges the order granting the motion for a new trial. Respondents cross-appeal to challenge the order denying the JNOV, and further protectively cross-appeal on the grounds that insufficient evidence supported the jury's verdict, the damages award was unsupported by the record, and the jury improperly apportioned damages. We affirm the trial court's orders.

FACTUAL AND PROCEDURAL BACKGROUND

The following background facts are undisputed. Sharon Santos was a tenant at the Scott Villa apartment complex. On August 19, 2004, Santos's employer called her sister because Santos had not been to work in two days and had not called in. Santos's sister called the apartment complex and asked the manager, Sue Peterson, to check Santos's apartment. Peterson checked the apartment and reported that Santos's purse and cell phone were in the apartment, but Santos was not. Santos was reported missing. Two weeks later, police found Santos's body in the trunk of her car, which had been abandoned in the Chinatown neighborhood of Los Angeles.

A maintenance man at the complex, Eriberto Rodriguez, became a suspect in the Burbank police department's investigation of Santos's murder. Rodriguez was a convicted felon and registered sex offender before respondents hired him. However, respondents did not perform a criminal background check on Rodriguez before hiring him and did not learn of his criminal background until after Santos's death. After Santos's death, it was discovered that Rodriguez had burglarized a number of apartments

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[1] To avoid confusion, we will refer to plaintiff, appellant, and cross-respondent Edna Santos as "appellant," and Sharon Santos as "Santos."

in the Scott Villa complex. He had also sexually assaulted a housekeeper who cleaned apartments in the complex. In March 2006, Rodriguez pled no contest to several counts of residential burglary, sexual battery, false imprisonment, and assault with intent to commit rape, sodomy, and oral copulation, among other charges. The court sentenced Rodriguez to 12 years in prison. Rodriguez has not been charged in connection with Santos's murder.

In 2006, appellant filed a wrongful death action against respondents, asserting causes of action for battery, negligence, negligent hiring, and negligent entrustment. Appellant's theory of respondents' liability centered entirely on the premise that Rodriguez was involved in Santos's disappearance and death. Thus, much of the trial concerned whether Rodriguez was responsible for Santos's murder. The arguments on appeal also focus on this issue. We turn to specific trial testimony.

In early to mid-June 2004, around two months before she disappeared, Santos told a friend that a ring was missing from her apartment. The ring was eventually discovered in Rodriguez's possession, along with items he had stolen from other tenants in the apartment complex. Around one week before Santos disappeared one of her neighbors saw her speaking with Rodriguez. Santos was inside of her apartment, and Rodriguez stood in the hallway.

Rosario Chavez, a glazier, testified that on or around August 18, 2004, he was called to do a job for the Scott Villa complex. At the complex, Rodriguez accompanied Chavez to the unit that needed work. When they passed Santos's apartment, Rodriguez said "there was some fine bitch that lived in [the] apartment," and "he wouldn't mind doing her." Rodriguez had spoken in a similar fashion about other women at the apartment complex. Approximately two days later, Chavez and a co-worker returned to the apartment complex to install glass he had ordered. Rodriguez pointed to Santos's apartment and said: "The lady that lives here is dead." Chavez's co-worker asked Rodriguez, in jest, "Why did you do it?" Rodriguez began to fidget and responded: "[T]hat is nothing to fuck around about. That's some serious shit." He turned and

walked away, then urged the two men to hurry with their tasks. Although Rodriguez commented that Santos was dead, her body was not found until September 2, 2004.

Jose Sanchez lived in Chinatown. One day in August 2004, he was eating lunch at his kitchen table when he saw someone park a car that was later identified as Santos's car. A man got out of the car, turned and went to the trunk, and looked up and down for around four seconds. He then walked away towards Bunker Hill, but stopped at the corner and changed directions. The man appeared to be lost. He was wearing dark pants and a white striped shirt, and looked well-dressed, like an office worker. Sanchez was 90 percent sure the man was Latino. According to plaintiff's expert witness, when a Burbank police detective showed Sanchez a six-pack photographic lineup, Sanchez picked out Rodriguez and another man, and indicated the driver of the car could have been either man.

Rodriguez's sexual crimes

Over respondents' objections, the court allowed appellant to introduce testimony from two women Rodriguez sexually assaulted: Nivia Molina and Petra Sandoval.[2]

Nivia Molina

In 1994, Nivia Molina and Rodriguez both worked at a market. Rodriguez often paid Molina unwanted attention; he accosted her when she was on breaks, he called her "baby," and looked at her "in the front and the back and [her] buttocks." He repeatedly asked her to go out with him. She once went to the mall with him and he bought her

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[2] Scott Villa objected by motion in limine to the testimony based on Evidence Code section 352, and later, section 1101. The trial court held a hearing under Evidence Code section 402 prior to the Nivia Molina testimony. The court initially concluded the Molina testimony would be premature until appellant established Rodriguez's involvement with Santos. Following the testimony of one of appellant's expert witnesses, the court again considered the Molina testimony and ruled that the probative value of Molina's testimony outweighed the potential prejudice. Scott Villa later renewed its objection to the Petra Sandoval testimony under Evidence Code sections 352 and 1101. The trial court ruled the evidence was more probative than prejudicial and was "relevant to a determination by the jury as to whether there is a common scheme, design or motive and intent by Mr. Rodriguez."

gifts; on another occasion they went to a park. On one occasion, Molina let Rodriguez into her apartment; he kissed her and felt her breasts, but Molina did not return Rodriguez's affection.

In May 1994, Rodriguez used a ruse to persuade Molina to enter his apartment. Rodriguez made sexual advances, which Molina refused. Rodriguez responded by getting a knife; he then raped Molina. He subsequently handcuffed her, taped her ankles together, and put tape on her mouth, removing it only to force her to orally copulate him. When Rodriguez left the room, Molina managed to escape by jumping out of a window. Rodriguez caught up with her and unlocked the handcuffs. Molina rolled under a pickup truck and screamed for help. Rodriguez claimed he would not do anything to her, but Molina feared he would kill her. She saw another man and approached him, screaming and crying for help. Rodriguez ran away. He fled to Mexico, then went to Chicago. He was arrested in Illinois and extradited to California. He eventually pled guilty to sexual battery with restraint.[3]

Petra Sandoval

Sandoval cleaned apartments for several tenants at the Scott Villa complex. At some point, Rodriguez began to "bother" her. He offered her rides, which she twice accepted. During the rides he invited her to a movie, but she refused. Then, one day he entered an apartment Sandoval was cleaning. He hugged her and the two struggled as Rodriguez tried to remove Sandoval's clothes. Rodriguez knocked her to the floor. Sandoval saw that Rodriguez looked angry, so she told him: "Okay, but not here." Rodriguez left, however she later found him waiting for her. The two went to a small room in the complex's parking garage. Rodriguez tried to take off Sandoval's clothes and force her to have sex, but she resisted. She refused Rodriguez's demands that she touch his penis. Rodriguez took off his pants, masturbated in front of her, and held her

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[3] At the time of trial, Molina believed Rodriguez had served six months for his crime against her. She had never had the chance to testify about what had happened, and admitted she felt Rodriguez had not paid for what he did to her.

from behind. He did not put his hands on her throat, or choke her. She feared for her life.

Sandoval later told the Scott Villa apartment manager, Peterson, that Rodriguez was "bothering" her. Peterson told her she was at fault. According to Peterson, she told Rodriguez not to go into apartments where Sandoval was cleaning, and she put a memo about the conversation in Rodriguez's personnel file. Sandoval eventually testified against Rodriguez in a criminal proceeding. In March 2006, Rodriguez pled no contest to sexual battery, false imprisonment, and assault with intent to commit rape, sodomy, and oral copulation, all arising out of his attack on Sandoval.

Expert Testimony

Appellant's Experts: Bumcrot and Albrecht

Bumcrot

Appellant offered the testimony of Michael Bumcrot, a retired detective with the Los Angeles County Sheriff Department's homicide bureau. Bumcrot had experience handling rape and murder cases. Because the Burbank police department was conducting an ongoing investigation of Santos's murder, police files and evidence were not available to Bumcrot for review. Instead, Bumcrot reviewed search warrants that the police served in connection with the case, reports and depositions from the civil case, and Rodriguez's criminal history. Bumcrot read police reports and testimony regarding the Molina and Sandoval incidents. He also spoke with Sean Kelley, the homicide detective from the Burbank police department in charge of the investigation of Santos's murder.

Bumcrot opined that Rodriguez was responsible for Santos's death. He identified Rodriguez as a sexual predator, based on Rodriguez's assaults of Molina and Sandoval, and the testimony of one of Rodriguez's former supervisors.[4] He concluded there were significant similarities between the Molina, Sandoval, and Santos cases:

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[4] The supervisor testified in a deposition that Rodriguez often flirted with female staff, including by hugging one woman from behind and thrusting his pelvis against her. The supervisor also reported he had seen Rodriguez in the back seat of his car with female minors.

> "I found that all three victims, Molina, Sandoval and Santos, were slight women. While Molina and Sandoval were sexually assaulted, Santos was found nude which would lead one to believe she was sexually assaulted. And I read [appellant's] deposition where Detective Kelley said [Santos] had been raped and the bone in her neck had been broken.[5] Molina and Sandoval both said they were choked by Mr. Rodriguez and the cause of death of Ms. Santos was strangulation. [¶] Molina was restrained by handcuffs and duct tape. The Santos search warrant lists duct tape, masking tape and twine which leads one to believe that Santos was restrained. Sandoval was attacked by Mr. Rodriguez who entered the location with a key. Ms. Santos's ring was recovered in the suspect's residence suggesting that he had a key to her apartment also. She was, and speaking of Ms. Sandoval, she was restrained in a small room while the other two were restrained by duct tape or whatever. Both Ms. Molina and Ms. Sandoval were foot swept to the floor."

Bumcrot additionally testified that, given the 75 percent recidivism rate for sexual predators, it was predictable that Rodriguez would commit another sexual offense after assaulting Molina, and "after Sandoval it was ever higher. It seemed that he always used the work place [as] a place for meeting these victims."

Bumcrot opined the ring Rodriguez stole from Santos was a "trophy," even though he stole it before Santos disappeared. According to Bumcrot, "if it were not a trophy and he had not been involved, [Bumcrot] would think he would have gotten rid of the ring." Bumcrot's review of the evidence also revealed that the first personal reference listed on Rodriguez's employment application with Scott Villa lived only one block away from where police eventually found Santos's body.

Although Bumcrot knew the Burbank police sent evidence related to Santos's murder to a crime lab for analysis, he admitted he was unaware of any forensic or DNA evidence linking Rodriguez to the crime.

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5 Although appellant testified at trial, she did not testify about any statements Detective Kelley made to her.

The "Only Suspect" Testimony

Before Bumcrot took the stand, respondents objected to a portion of Bumcrot's anticipated testimony. Respondents expected Bumcrot to testify that Detective Kelley told him there was no doubt Rodriguez killed Santos. Respondents contended this was impermissible hearsay since Kelley would not be available, and even if admissible, the statement should be excluded as overly prejudicial under Evidence Code section 352. The trial court sustained the objection. However, on cross-examination, respondent's counsel asked Bumcrot about the details of his conversation with Kelley, and requested: "Tell me now everything Detective Kelley told you during that conversation." Bumcrot answered the question, but did not include the statements the court had previously excluded. The following day, appellant asked the court to revisit its ruling excluding Detective Kelley's statement, based on respondents' broad question on cross-examination. The court agreed that respondents had "opened the door" to the challenged testimony by asking Bumcrot to state everything Kelley had told him. On redirect, Bumcrot was allowed to testify that Detective Kelley told him there was no doubt in his mind Rodriguez was involved in Santos's murder, and Rodriguez was the only suspect. The court gave the following admonition: "Ladies and gentlemen, what you just heard is not being offered to you, nor should it be considered by you for the truth of the matter contained within what the – this witness said was said to him, but rather that it was said to him. Do you understand the difference? Does anybody not understand the difference raise your hand. No hands are shown."

Albrecht

Appellant also offered the expert testimony of Steven Albrecht, a former police officer and high-risk human resources specialist. Albrecht opined that Scott Villa failed to adequately protect its tenants and employees by neglecting to conduct a criminal background check on Rodriguez, by not having a stricter policy to control access to the

apartment unit keys or a master key,[6] and by failing to protect employees or vendors such as Sandoval. Albrecht further testified that, based on his experience in criminal profiling, he saw a connection between Molina, Sandoval, and Santos, based on their size, skin color, age, and connection to Rodriguez's workplace.

Respondents' Expert: Thrasher

Respondents offered the expert testimony of Michael Thrasher, a retired detective with the Los Angeles police department. Thrasher reviewed depositions from the case, news reports about Santos's murder, documents from the Molina and Sandoval prosecutions of Rodriguez, and search warrants. Thrasher opined that although Rodriguez may have been a suspect, nothing in the materials Thrasher reviewed led him to "any compelling evidence that [Rodriguez] was involved in the disappearance and death of [Santos.]" Thrasher testified that Burbank police had only referred to Rodriguez as a "person of interest," even though the police had issued search warrants, canvassed the location where the Santos's car was found many times, and offered a reward for information about Santos's murder. Thrasher opined that if the Burbank police had enough evidence to charge Rodriguez with Santos's murder, they would have done so.

Thrasher also indicated there were dissimilarities between the Molina and Sandoval assaults, and what was known about Santos's murder. Thrasher testified that while Molina and Rodriguez had an established relationship before the assault, the only known contact between Rodriguez and Santos was the single conversation Santos's neighbor observed. Thrasher also noted that Rodriguez had given Sandoval rides and the two had talked before he assaulted her. There was no evidence that any such relationship existed between Rodriguez and Santos. Thrasher further found it meaningful that

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[6] Rodriguez had at least some access to apartment unit keys. According to Peterson, Rodriguez had access to keys to an individual apartment when there was work to be done on that unit, but otherwise the keys were locked away. However she also testified she would not know if he ever took the keys when she was not there. For one full day twice per year, Rodriguez had access to a master key so that the air conditioning units and smoke alarms in each unit could be checked.

Rodriguez immediately fled the country after assaulting Molina, but after Santos disappeared, Rodriguez continued working at the apartment complex for several more months and even committed additional burglaries at the complex.

Jury Verdict

The jury returned a special verdict finding respondents were negligent, and the negligence was a substantial factor in causing Santos's death. The jury awarded appellant $12 million in damages, apportioned as 90 percent attributable to respondents, and 10 percent to Rodriguez.

Post-Verdict Motions

Respondents filed a motion for judgment notwithstanding the verdict (JNOV) and a motion for new trial. In the motion for JNOV, respondents argued appellant had not proved her case because there was no substantial evidence to support the verdict; Bumcrot's opinions were only speculation and conjecture; Bumcrot's opinion was based on improper hearsay that should have been excluded; and respondents were prejudiced by appellant's stereotyping of Rodriguez as a sexually violent predator. Respondents argued in their motion for new trial that the evidence at trial was insufficient to justify the jury's verdict; the verdict was excessive and irrationally apportioned; and the court improperly admitted the Molina and Sandoval testimony.

The trial court denied the JNOV motion, but granted the motion for new trial. In its written ruling, the court noted that Rodriguez's prior propensity to commit sexual assaults, his thefts from the apartment complex, and his statement that Santos was dead before her body was found, were not evidence that Rodriguez was responsible for Santos's death. The court further noted there was "no apparent evidence" that Santos was sexually assaulted, and the theft of her ring did not give rise to a legitimate inference that Rodriguez murdered her. The court additionally remarked that given the absence of evidence to show Santos was abducted from or murdered in her apartment, that Rodriguez had access to her unit did not create an inference that he murdered her. However, the court continued:

> "Santos' expert witness testified that his review of the murder of Sharon Santos left him with no doubt that Rodriguez was responsible, based largely, if not entirely, on hearsay obtained from and contained within his discussions with members of the Burbank Police Department who, nonetheless, refused to aid in prosecution of the instant civil case based on their concern that it might compromise their ongoing criminal investigation. [¶] Given that the defects in the admissibility of the evidence are immaterial for the purposes of a JNOV [citation] and that a court may not judge the credibility of the evidence or weigh it when considering a JNOV [citation], the court finds that the testimony of detective Bumcrot, Santos' expert, is sufficient grounds to support the verdict; consequently, defendants' motion for JNOV is denied."

When addressing the motion for new trial, the court found appellant did not present evidence connecting Rodriguez to the crime, noting several areas in which appellant lacked any evidence.[7] In light of the "woeful lack of evidence," the court granted respondents' motion for new trial on all issues. The appeal and cross-appeal followed.

DISCUSSION

I. The Trial Court Did Not Err in Denying Respondents' Motion for JNOV

We begin our review with respondents' cross-appeal challenging the trial court's order denying the motion for JNOV.

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[7] These areas were: lack of witnesses to Santos's murder or abduction; lack of evidence regarding the location of her murder; lack of evidence connecting Rodriguez to Santos at the time of her disappearance; lack of evidence of any physical interaction between Rodriguez and Santos; lack of evidence connecting Rodriguez to Santos's car; lack of evidence that Rodriguez sexually assaulted Santos; absence of DNA or other forensic evidence implicating Rodriguez; lack of evidence that property sought or obtained as the result of search warrants was used in Santos's murder or abduction; lack of evidence that Rodriguez used a master key or any other key on the day Santos disappeared; lack of evidence that Rodriguez's burglaries at the apartment complex resulted in physical contact or harm with a burglary victim; and lack of evidence that forensic or DNA evidence has been or will be analyzed to establish that Rodriguez was connected to Santos's abduction or murder.

When reviewing a denial of a motion for JNOV, our task is to " ' " 'determine whether there is any substantial evidence, contradicted or uncontradicted, supporting the jury's conclusion and where so found, to uphold the trial court's denial of the motion.' " [Citation.]' [Citation.]" (*Dell'Oca v. Bank of New York Trust Co., N.A.* (2008) 159 Cal.App.4th 531, 555.) "A motion for judgment notwithstanding the verdict may be granted only if it appears from the evidence, viewed in the light most favorable to the party securing the verdict, that there is no substantial evidence in support. [Citation.]" (*Sweatman v. Department of Veterans Affairs* (2001) 25 Cal.4th 62, 68.)

We "indulge in all legitimate and reasonable inferences to uphold the verdict. [Citation.] Even the uncorroborated testimony of a single witness may constitute substantial evidence. [Citation.] [¶] Although our review begins and ends with a determination that there exists substantial evidence to support the verdict, 'this does not mean we must blindly seize any evidence in support of the respondent in order to affirm the judgment.' [Citation.] Substantial evidence is not synonymous with ' " 'any' evidence." ' [Citation.] To be substantial, the evidence must be credible and of solid value. [Citation.] 'While substantial evidence may consist of inferences, such inferences must be "a product of logic and reason" and "must rest on the evidence" [citation]; inferences that are the result of mere speculation or conjecture cannot support a finding [citations.]' [Citation.]" (*Casella v. SouthWest Dealer Services, Inc.* (2007) 157 Cal.App.4th 1127, 1144 (*Casella*).)[8]

Appellant offered circumstantial evidence to connect Rodriguez to Santos's murder. For example, Rodriguez told Chavez that Santos was "a fine bitch," and that he would like "to do her." A neighbor saw Rodriguez talking with Santos around one week before she disappeared. Among his many burglaries at the apartment complex,

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8 We also note as an initial matter that it is not necessarily inconsistent for the trial court to deny a motion for JNOV while granting a motion for new trial based on insufficiency of the evidence. As discussed in greater detail below, the two motions require the application of two different tests. (*Jones v. Evans* (1970) 4 Cal.App.3d 115, 121.)

Rodriguez stole a ring from Santos's apartment almost two months before she disappeared. He did not dispose of the ring, even after Santos went missing and was discovered murdered. Rodriguez was a registered sex offender who sexually assaulted a housekeeper who worked in Santos's apartment complex, and a coworker at another workplace before that. Although there was no direct evidence that Santos was sexually assaulted or raped before or after she was killed, Bumcrot opined that the fact her body was found naked in the trunk of her car suggested there was a sexual assault. Bumcrot's opinion was also based on appellant's deposition testimony, in which she stated Detective Kelley told her Santos had been raped.

After Santos disappeared, but before her body was discovered, Rodriguez told Chavez that Santos was dead. He reacted nervously when Chavez's co-worker jokingly asked Rodriguez why he had killed her. Sanchez identified Rodriguez as one of two men he thought could have been the man driving Santos's car when it was parked and abandoned in Chinatown. Rodriguez also had a personal connection who lived close to the location where Santos's car was found.

Appellant additionally offered expert witness testimony, at least some of which was substantial evidence.

Expert witness testimony may be substantial evidence, but not when the testimony is "based on conclusions or assumptions not supported by evidence in the record [citation], or upon matters not reasonably relied upon by other experts [citation]. Further, an expert's opinion testimony does not achieve the dignity of substantial evidence where the expert bases his or her conclusion on speculative, remote or conjectural factors. [Citation.]" (*People Ex Rel. Brown v. Tri-Union Seafoods, LLC* (2009) 171 Cal.App.4th 1549, 1567.)

Although elements of Bumcrot's opinion were not supported by evidence in the record, we focus on the portions that were. For example, Bumcrot's testimony that all three women were Hispanic and of small build was uncontested. The testimony that all three women were associated with Rodriguez's place of work was an established fact. His opinion that there was a sexual element to all three crimes, including Santos's

murder, was based on hearsay from appellant and Detective Kelley, as well as his own professional experience, which led to his conclusion that a sexual aspect to Santos's murder was probable given that her body was discovered naked in her trunk. His testimony that Santos was strangled was based on the hearsay statements of appellant and Kelley, and his own experience which led him to a conclusion from the information that a bone in Santos's neck was broken. His understanding that Molina and Sandoval were also strangled or choked was based on his review of police reports, preliminary hearing transcripts, and trial transcripts related to the Molina and Sandoval incidents.[9]

Much of Bumcrot's opinion was based on conclusions he drew from hearsay statements.[10] But hearsay is not the same as speculation or conjecture. An expert may permissibly rely on hearsay to form an opinion. (*North American Capacity Ins. Co. v. Claremont Liability Ins. Co.* (2009) 177 Cal.App.4th 272, 294.) Moreover, even if some of Bumcrot's testimony about the basis for his opinion was improperly admitted—because the testimony itself constituted hearsay, for example—when reviewing the trial court's ruling on a motion for JNOV, we, like the trial court, still consider the testimony and evaluate whether it was substantial evidence. (*Donahue v. Ziv Television Programs, Inc.* (1966) 245 Cal.App.2d 593, 610 (*Donahue*); see also *Estate of Callahan* (1967) 67 Cal.2d 609, 617 [in review of nonsuit all evidence must be considered if relevant, even if improperly admitted]; *Beavers v. Allstate Ins. Co.* (1990) 225 Cal.App.3d 310, 327

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9 Neither Molina nor Sandoval testified at this trial that Rodriguez strangled or choked them. But Bumcrot had reviewed previous testimony related to Rodriguez's assaults of the two women. This difference creates a conflict in the evidence. When reviewing a ruling on a motion for JNOV we view the evidence in the light most favorable to the party who secured the verdict, whether it is contradicted or uncontradicted.

10 This includes Bumcrot's testimony that Detective Kelley told him there was "no doubt in his mind" Rodriguez was Santos's assailant and that Rodriguez was the only suspect. We do not discuss or rely on this to the same extent as the parties do, given the trial court's limiting instruction on how the jury was to consider the evidence – only for the fact it was said to Bumcrot. So, it was only appropriately considered by the jury as an additional basis for Bumcrot's own opinions.

[court's power to grant nonsuit is the same as the power to grant JNOV, and governed by the same rules].)

Respondents rely on *Leslie G. v. Perry & Associates* (1996) 43 Cal.App.4th 472 (*Leslie G.*) to support their contention that Bumcrot's testimony was not substantial evidence. We find the case inapposite. In *Leslie G.*, the trial court granted summary judgment to a defendant apartment complex that was sued after the plaintiff was raped in the apartment's parking garage. The plaintiff argued the defendant negligently failed to fix a broken security gate to the garage. She further contended that had the security gate been fixed, the attack on her would not have occurred. (*Id.* at pp. 477-479.) However, the plaintiff did not establish that the rapist entered the garage through the broken gate, and there were other means of access that could not be ruled out. (*Id.* at pp. 479, 483-484.) The plaintiff's expert witness *assumed* the rapist entered the garage through the broken gate, and, based on that assumption, opined that the defendant should have taken additional security measures to ensure the safety of tenants. (*Id.* at pp. 478-479.)

The *Leslie G.* court concluded the testimony of the plaintiff's expert could not constitute substantial evidence because his opinion was based on an unsupported assumption that the rapist entered through the broken gate. Unlike the expert in *Leslie G.*, Bumcrot's opinion was not based entirely on a single unsupported assumption. Instead, Bumcrot's conclusions underlying his overall opinion were based at least in part on undisputed facts, and factual statements from appellant and Kelley about what happened to Santos. Bumcrot's opinion was also informed by facts such as Rodriguez's theft of Santos's ring, his access to keys at the apartment complex, and the Sanchez partial identification of Rodriguez. Bumcrot's opinion was therefore different from that of the *Leslie G.* expert, whose opinion was premised on the assumption that the rapist entered through the broken garage gate, when there was no evidence, admissible or not, to support the assumption.

We also note that although this case and *Leslie G.* both involved the alleged negligence of an apartment complex owner in connection with a third-party crime against a tenant, the expert testimony was offered for somewhat different purposes in each case.

In *Leslie G.*, the expert's testimony was offered to prove the final step in causation—that the landlord failed to take steps that would have prevented the rapist from attacking the plaintiff. In this case, Bumcrot's testimony was offered to establish an earlier step in causation. If this were the *Leslie G.* case, Bumcrot's testimony would have been offered to show that the rapist did, in fact, enter through the broken gate.

Bumcrot's opinion that there was a connection between the Molina and Sandoval assaults and Santos's murder was substantial evidence, as was his opinion that the similarities he discerned were significant enough to indicate Rodriguez's involvement in Santos's murder. In addition, there was circumstantial evidence from which the jury could draw legitimate inferences that Rodriguez was involved, particularly Rodriguez's pronouncement that Santos was dead, which he made at a time when presumably only Santos's killer knew she had been murdered. The weight of this evidence, that it was contradicted, and the credibility of the witnesses who offered it, are not at issue in this analysis. (*Ajaxo Inc. v. E*Trade Group, Inc.* (2005) 135 Cal.App.4th 21, 49.)

Thus, we conclude the trial court properly denied Scott Villa's motion for JNOV.

II. The Trial Court Did Not Abuse Its Discretion in Granting Scott Villa's Motion for New Trial

"The standards for reviewing an order granting a new trial are well settled. After authorizing trial courts to grant a new trial on the grounds of . . . '[i]nsufficiency of the evidence,' [Code of Civil Procedure] section 657 provides: '[O]n appeal from an order granting a new trial upon the ground of the insufficiency of the evidence . . . *such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons*.' (Italics added.) Thus . . . an order granting a new trial under section 657 'must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on [the trial court's] theory.' [Citation.] Moreover, '[a]n abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached. . . .' [Citation.] In other words, 'the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the [new trial] order.'

[Citation.] [¶] The reason for this deference 'is that the trial court, in ruling on [a new trial] motion, sits ... as an independent trier of fact.' [Citation.] Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations." (*Lane v. Hughes Aircraft Co.* (2000) 22 Cal.4th 405, 411-412 (*Lane*).)

The trial court clearly indicated in its written ruling that it was granting Scott Villa's motion for new trial because it found there was insufficient evidence to support the verdict (Code Civ. Proc., § 657(6).) The court did not abuse its discretion. Most of the case depended on whether Rodriguez was involved in Santos's death, and there was a significant conflict in the evidence on this issue. There was no direct evidence establishing that Rodriguez was connected to Santos's disappearance or murder, and a reasonable jury could have concluded that the circumstantial evidence was too weak to be meaningful. Indeed, the jury would have been entitled to reject any or all of the inferences appellant suggested it make based on circumstantial evidence, such as: that the 75 percent recidivism rate for sexual offenders suggested Rodriguez killed Santos; that Rodriguez's prior sexual assaults pointed to his guilt, despite a lack of details about the circumstances of Santos's death; or that Rodriguez's burglary of Santos's apartment months before she disappeared made it likely he killed her.

A jury could also reasonably have rejected Bumcrot's analysis of the claimed similarities between the Molina and Sandoval assaults, and the little known about Santos's death. In that vein, a jury could reasonably have accepted the testimony of Scott Villa's expert witness Thrasher, who opined there was nothing in the evidence that indicated Rodriguez was involved in Santos's murder.

Further, a jury would have been entitled to be persuaded by the lack of evidence to establish Rodriguez's guilt. As the trial court noted in its ruling, there was no forensic evidence offered to link Rodriguez to Santos, there was little evidence showing any kind of connection or contact between Rodriguez and Santos, and appellant offered almost no evidence about the circumstances of Santos's disappearance or murder.

" 'An abuse of discretion [warranting reversal of a new trial order] *cannot be found* in cases in which the evidence is in conflict. . . .' [Citation.]" (*Lane, supra,* 22 Cal.4th at p. 416, italics in original.) Here, there was certainly conflicting evidence, and substantial evidence supports the trial court's reasons for concluding a new trial was appropriate. "The trial court sits much closer to the evidence than an appellate court. Even the most comprehensive study of a trial court record cannot replace the immediacy of being present at the trial, watching and hearing as the evidence unfolds. The trial court, therefore, is in the best position to assess the reliability of a jury's verdict and, to this end, the Legislature has granted trial courts broad discretion to order new trials. The only relevant limitation on this discretion is that the trial court must state its reasons for granting the new trial, and there must be substantial evidence in the record to support those reasons. [Citation.]" (*Id.* at p. 412.) We find no abuse of discretion.

Appellant asserts the trial court actually granted a new trial based on errors of law, and that to the extent the trial court based its ruling on insufficient evidence, it failed to consider the entire record. We reject both arguments.

As to appellant's first contention, the trial court's order is not ambiguous. The court specifically stated it was granting the motion for new trial based on insufficient evidence, and the court's written ruling cited the relevant statutory section, Code of Civil Procedure section 657(6). Even if the trial court intended its discussion on the JNOV ruling to apply equally to the subsequent ruling on the motion for new trial, appellant's argument that the grant of new trial was based on a trial court finding of errors of law is still incorrect.[11] The trial court did not specifically find any of its evidentiary rulings

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[11] The last two paragraphs of the trial court's ruling on the motion for JNOV stated: "Given that the defects in the admissibility of the evidence are immaterial for the purposes of a JNOV (see *Donahue, supra,* 245 Cal.App.2d at 609—the appropriate remedy for defectively admitted evidence is a new trial) and that a court may not judge the credibility of the evidence or weigh it when considering a JNOV [citation], the court finds that the testimony of detective Bumcrot, Santos' expert, is sufficient grounds to support the verdict; consequently, defendants' motion for JNOV is DENIED. [¶] The JNOV also argues that the foundation for Santos' expert Bumcrot was based on

were improper. Instead, the court noted that any defects in the admissibility of the evidence were *immaterial* for purposes of the JNOV, and it therefore rejected Scott Villa's argument that incorrect evidentiary rulings mandated a judgment notwithstanding the verdict. The court's citation to *Donahue* served to note that, at most, incorrect evidentiary rulings would warrant a new trial, not a JNOV. The citation to *Donahue* does not indicate the court was subsequently granting the motion for new trial because of improperly admitted evidence.

Further, appellant's interpretation of *Lane* is misplaced. In *Lane*, our high court noted that in an order combining rulings on a motion for JNOV and a motion for new trial, the trial court is not required to repeat findings made in the JNOV section in a later section regarding the motion for new trial. Instead, the court may refer to the previous findings. (*Lane, supra,* 22 Cal.4th at p. 413.) But nothing in *Lane* suggests the trial court *must* combine the substance of the two rulings, or that one section must necessarily refer to the other. Here, while the trial court's broad discussion of the evidence in the JNOV section of the ruling may be relevant to its ruling on the motion for new trial, we reject appellant's assertion that the trial court's statements explicitly ruling on the JNOV motion alone also formed the basis for the ruling on the motion for new trial.

Similarly, we understand the end of the trial court's JNOV ruling to mean that the trial court did not need to address respondents' assertion that they were prejudiced by the "stereotyping [of] Rodriguez as a violent sexual predator" because the court's decision to grant a new trial rendered the issue moot.[12]

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inadmissible hearsay and that the moving parties were prejudiced by stereotyping Rodriguez as a violent sexual predator. As to the first assertion, the admissibility of evidence is not considered when ruling on a JNOV. As to the second assertion concerning prejudice, the court's disposition of defendants' motion for a new trial (*infra*) will remedy that aspect." The next portion of the ruling addressed the motion for new trial and specifically stated the motion was granted "on the grounds that the evidence was insufficient to support the verdict per Code Civ. Proc., § 657(6)."

[12] Indeed, even if the trial court had based its order on both grounds—insufficiency of the evidence and errors of law—we would still affirm on the insufficiency of the

Appellant's second contention similarly asks us to find fault with the trial court's ruling based on an assertion that is unsupported by the record. Appellant argues the trial court did not consider the entire record when evaluating the motion for new trial, namely the evidence the trial court believed was improperly admitted. First, as noted above, the trial court did not specifically find any of its evidentiary rulings were in error. Second, nothing indicates the trial court did not consider the entire record, or that it omitted evidence such as Bumcrot's testimony when evaluating the motion for new trial.

Under section 657, the trial court must not grant a new trial based on insufficiency of the evidence unless, "after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the . . . jury clearly should have reached a different verdict or decision." It is a fundamental principle of appellate review that we presume the trial court has followed the law, unless the record demonstrates otherwise. (*Wilson v. Sunshine Meat & Liquor Co.* (1983) 34 Cal.3d 554, 563; *Maher v. Saad* (2000) 82 Cal.App.4th 1317, 1324 [in review of order granting new trial based on instructional error, the appellate court would presume trial court examined the entire cause unless record established otherwise].) In this case, there is nothing in the record to suggest the trial court failed to consider all of the evidence when ruling on the motion for new trial.

Implicit in appellant's arguments is an assertion that because the trial court found substantial evidence supported the verdict such that denial of the motion for JNOV was appropriate, the court was required to find that same evidence mandated denial of the motion for new trial. This assertion overlooks the different tests applicable to each

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evidence ground, regardless of whether the "error of law" ground was proper. (*Ovando v. County of Los Angeles* (2008) 159 Cal.App.4th 42, 60 (*Ovando*).)

Because we conclude the trial court granted the motion for new trial on the basis of insufficiency of the evidence—while *considering* the questionable evidence—and we affirm on that ground, we need not determine whether the trial court made prejudicially incorrect evidentiary rulings. On retrial, the trial court and the parties will have the opportunity to argue and determine anew the issues involving Evidence Code sections 1101 and 352, and hearsay or other foundational problems in the Bumcrot testimony.

motion. In evaluating the motion for JNOV, the trial court was prohibited from weighing the evidence or assessing credibility, and was tasked with determining whether there was any substantial evidence, contradicted or uncontradicted, to support the jury's verdict. But, when it came to the motion for new trial, the court was required to weigh the evidence, consider the credibility of witnesses, and determine whether the weight of the evidence went against the jury's verdict. (*Casella, supra,* 157 Cal.App.4th at pp. 1159-1160.) Moreover, the trial court was free to draw inferences from the evidence different from those the jury accepted. (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 379.) It was the trial court's duty to grant a new trial if in the court's opinion the weight of the evidence was contrary to the jury's finding. (*Tice v. Kaiser Co.* (1951) 102 Cal.App.2d 44, 46.)

As a result, it was proper for the trial court to consider Bumcrot's testimony when evaluating the motion for new trial, but to also conclude the testimony was not entitled to much weight, or to any weight at all. This determination was amply supported by the record. Much of Bumcrot's testimony was based on hearsay that went unconfirmed, and even then, Bumcrot knew very little about the circumstances of Santos's death. The trial court was entitled to reject Bumcrot's conclusion that significant similarities between the Molina, Sandoval, and Santos situations implicated Rodriguez in Santos's murder. Further, the trial court could reasonably discount Bumcrot's opinion to the extent it was based on Detective Kelley's statement of opinion about Rodriguez. No evidence was offered to explain why Kelley felt Rodriguez was involved in Santos's murder, and despite Kelley's certainty, the Burbank police department has yet to charge Rodriguez in the Santos matter. Thus, under section 657, the trial court could both consider the Bumcrot testimony *and* decide that the weight of the evidence went against the jury's verdict.

We do not decide or suggest that had the court granted a new trial because of errors in law, it would have erred in doing so. Rather, we simply do not reach the issue because it is clear the trial court based its order on insufficiency of the evidence.

Because we affirm the order granting a new trial, the remaining issues raised in respondents' protective cross-appeal are moot and we do not consider them. (*Ovando, supra,* 159 Cal.App.4th at p. 60.)

DISPOSITION

The trial court's orders denying the motion for JNOV and granting the motion for new trial are affirmed. Each party shall bear its own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

BIGELOW, J.

We concur:

RUBIN, Acting P. J.

FLIER, J.